No. 06-1181

IN THE

Supreme Court of the United States

SAMSON TAIWO ADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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This Court ordered briefing on the question "[w]hether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period." Permitting withdrawal offers an alternative to tolling that properly reconciles the statutory provisions. That the statute permits such a construction is demonstrated by the Department of Justice's own proposed rule, which would permit an alien to "withdraw from the arrangement into which he or she effectively entered ... at the time of seeking and accepting voluntary departure" and pursue a motion to reopen. 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007).

Accordingly, if the Court does not adopt a tolling construction, it should interpret the statute to permit Petitioner to withdraw his voluntary departure request, which he expressly sought to do, so that he can pursue his motion to reopen.

STATUTORY AND REGULATORY BACKGROUND

1. This case concerns two provisions of the INA, one governing voluntary departure, and the other addressing motions to reopen. Voluntary departure is a discretionary form of relief available to aliens who meet certain criteria. 8 U.S.C. § 1229c(a)(1), (b)(1). An alien who contests his removal—seeking, for example, adjustment of status, cancellation of removal, or asylum—remains eligible for voluntary departure. *Id.* § 1229c(b)(1). If an immigration judge denies relief from removal, the immigration judge may then grant the alien voluntary departure, setting a period of up to 60 days for the alien to depart the country. *Id.* § 1229c(b)(2). An alien granted voluntary departure is not subject to a final order of removal; rather, the immigration judge enters an "alternate order o[f] re-

moval," 8 C.F.R. § 1240.26(d), which takes effect if the alien does not depart during the voluntary departure period, *id.* § 1241.1(f).

Under the statute and regulations, an alien granted voluntary departure does not waive rights to seek further review. The alien may file an appeal with the Board of Immigration Appeals, challenging the denial of any underlying relief, such as adjustment of status or cancellation of removal. The alien's voluntary departure period is "toll[ed]" during this administrative appeal. *Matter of A-M-*, 23 I. & N. Dec. 737, 743 (BIA 2005). Once an alien receives a final decision from the BIA, he may appeal to the court of appeals by filing a petition for review. 8 U.S.C. § 1252(a). In most circuits, the court can stay the voluntary departure period pending this review. *See* Reply Br. 14 n.9; Gov't Br. 35-36 & n.15.

2. The INA provides that all aliens, including those granted voluntary departure, may also file one motion to reopen, based on "new facts," within 90 days of the agency's final decision. 8 U.S.C. § 1229a(c)(7)(B), (C)(i). These new facts can relate, for example, to the health of an alien's family member or a change in the immigration status of a spouse. *See id.* § 1229b(b)(1)(D) (cancellation of removal available when removal would cause "exceptional and extremely unusual hardship" to a United States citizen or lawful permanent resident who is the spouse, parent, or child of the alien); *id.* §§ 1151(b)(2)(A)(i), 1154(a), 1255(a) (adjustment of status available when a spouse naturalizes to become a United States citizen); *see also, e.g.*, *Matter of Diaz-Ruacho*, 24 I. & N. Dec. 47, 48, 51 (BIA 2006) (alien's parents diagnosed with serious health problems; motion to reopen granted); *Chedad* v. *Gonzales*, 497 F.3d 57, 59-60 (1st Cir. 2007) (alien's spouse naturalized to be-

come a United States citizen; motion to reopen initially granted).

Under the agency's regulations, motions to reopen can only be resolved if the alien is in the country; if an alien departs, then reopening is unavailable. 8 C.F.R. § 1003.2(d). Nor, in many cases, can the alien simply leave the country and pursue the underlying relief from abroad; for many aliens (including Petitioner), the alien will be subject to "unlawful presence" bars upon departure. These bars prevent readmission for up to 10 years and are triggered by any departure from the country, including voluntary departure. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II); *see also* 4 Gordon, et al., *Immigration Law and Procedure* §§ 51.01(3), 51.03(3) (2007).[1]

Although those aliens subject to a final removal order may seek an administrative stay, thereby permitting adjudication of the motion to reopen while the alien remains in the country, *see* 8 C.F.R. §§ 1003.2(f), 241.6, these stays are not available to voluntary departure recipients, *see* Reply Br. 13-14.

ARGUMENT

The question in this case is how to reconcile the voluntary departure and motion to reopen provisions. This Court has requested supplemental briefing on one possible approach: permit an alien who has been granted voluntary departure and has filed a timely motion to reopen to withdraw the request for voluntary departure prior to the expiration of the voluntary de-

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[1] The prevalence of unlawful presence bars is apparent from the cases in the circuit split at issue here; in six of the seven cases, it appears that the alien's departure would have triggered a 10-year unlawful presence bar. *See* American Immigration Law Foundation Amicus Br. 8 & n.6.

parture period. Withdrawal is consistent with the statute—giving content to both the voluntary departure and motion to reopen provisions—and permissible under the agency's current and proposed regulations. If the Court does not adopt a tolling construction, it should permit an alien filing a timely motion to reopen to withdraw his request for voluntary departure.

I. PERMITTING WITHDRAWAL PROPERLY RECONCILES THE TWO STATUTORY PROVISIONS

Permitting withdrawal, like tolling, avoids the unworkable trap that the Government's reading would impose on aliens and, in turn, harmonizes the statutory provisions.

1. In the current litigation, the Government has rejected statutory constructions that give content to both the voluntary departure and motion to reopen provisions. Instead, the Government would place an alien faced with changed circumstances in a trap, leaving the availability of a motion to reopen to chance. The alien must either (1) depart the country within the voluntary departure period (thereby losing the ability to pursue reopening and, in many cases, rendering him subject to statutory bars on readmission for up to 10 years) or (2) remain in the country awaiting a decision on the motion to reopen, risking staying past the voluntary departure period, which will not only render the alien ineligible for the very relief sought, but also subject him to additional statutory penalties, 8 U.S.C. § 1229c(d)(1). In this lose-lose scenario, because the alien had obtained voluntary departure at an earlier point in time, he has effectively lost his ability to pursue a motion to reopen based on changed circumstances.

The Government rationalizes this result by arguing that it is part of a quid pro quo that the alien agreed to

when he was granted voluntary departure. Yet the Government agrees that the alien can file a motion to reopen and, if the agency happens to act quickly enough, the alien can receive an adjudication of that motion; thus, the Government agrees that adjudication of a motion to reopen has not been relinquished. Moreover, the Department's proposed rule necessarily rejects the notion that Congress intended aliens to forfeit motions to reopen as part of a voluntary departure bargain; the proposed rule "is intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions [including motions to reopen] without risking the imposition of the voluntary departure penalties." 72 Fed. Reg. 67,674, 67,679 (Nov. 30, 2007).

Given that the Government's trap, which effectively eliminates motions to reopen for these aliens, is not required by a statutory quid pro quo, it makes little sense to interpret the statute to yield this arbitrary result.[2] The tolling construction that Petitioner favors avoids this trap and, in so doing, properly reconciles the statutory provisions. Permitting withdrawal provides a similarly viable interpretation of the statute.

2. Nearly all of the arguments that Petitioner presented in support of a tolling construction apply equally to an interpretation that permits withdrawal.

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[2] Indeed, the Government appears to have ended up in its current litigation position as a result of agency inaction. In 1997, the Department suggested tolling as a possible solution. 62 Fed. Reg. 10,312, 10,325-10,326 (Mar. 6, 1997). Now, approximately ten years later, the Department has proposed prospective regulations that permit withdrawal—thereby preserving motions to reopen for those who have been granted voluntary departure. 72 Fed. Reg. at 67,679.

See Pet. Br. Parts I.A-C, II; Reply Br. Part I. When the statute is interpreted as a whole, it must be read to safeguard access to motions to reopen for aliens granted voluntary departure. Like tolling, withdrawal does so, while also respecting the limits on motions to reopen and voluntary departure set by Congress.

Under a withdrawal construction, the alien filing a motion to reopen would—like Petitioner in this case[3]—seek withdrawal of the voluntary departure request,[4] which would be effective immediately upon filing. If withdrawal were not effective immediately (but, rather, needed to be acted upon by the agency), then the same problems would exist as under the Government's current construction—withdrawal, and motions to reopen in turn, would be dependent on whether the agency happened to act in time.[5]

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[3] Petitioner requested this relief before the BIA and raised the issue at every stage of the proceeding. Reply Br. 20 & n.14.

[4] The Court could also construe the statute such that the filing of a motion to reopen by an alien granted voluntary departure would trigger withdrawal from voluntary departure (thus also reaching aliens who did not request withdrawal expressly). The Department's proposed rule takes this approach. 72 Fed. Reg. at 67,679; *see also* Part II.1 *infra*. The Court may consider the Department's prospective solution and interpret the statute consistent with it. *Cf. S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1848-1849 (2006) (confirming understanding of disputed statutory term based on agencies' interpretation even though the interpretation was not "formally settled"); *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 496-497 (2002) (adopting interpretation that was consistent with agency's "recently proposed rule").

[5] The Department agrees that automatic withdrawal—effective without an agency decision—is consistent with the statute. *See* 72 Fed. Reg. at 67,679, 67,682, 67,683.

Upon withdrawal, the alien would give up the benefits of voluntary departure, but be able to pursue a motion to reopen in light of changed circumstances. The alien would be in the same position as other aliens who were not granted voluntary departure: the alien would be subject to a final order of removal, *cf.* 8 C.F.R. § 1240.26(d), but, like other aliens subject to a final removal order, could seek an administrative stay of removal, *see id.* §§ 1003.2(f), 241.6.[6]

Permitting withdrawal thus avoids the trap created by the Government's reading by safeguarding motions to reopen for voluntary departure recipients. Moreover, because the aliens seeking motions to reopen are placed in the same position as other aliens who were not granted voluntary departure, withdrawal retains Congress's limits on the period in which an alien may depart the country voluntarily and would not invite any abuse.

II. THE DEPARTMENT OF JUSTICE'S PROPOSED RULE AND CURRENT AGENCY REGULATIONS AND PRACTICE OFFER FURTHER SUPPORT FOR PERMITTING WITHDRAWAL

1. The Department agrees that permitting an alien to withdraw his request for voluntary departure, so as to permit him to pursue a motion to reopen, is consistent with the statute. In fact, the Department has proposed such a solution prospectively.

According to the Department, "[t]he voluntary departure statute does not unambiguously provide that permission to depart voluntarily is irrevocable once granted." *See* 72 Fed. Reg. at 67,679. Rather, the stat-

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[6] Such administrative stays are not available during the voluntary departure period. *See* Reply Br. 13-14.

ute permits a construction whereby the filing of a motion to reopen causes the voluntary departure grant to automatically terminate. *See id.* Under the Department's proposal, "[t]he alien will be free to forgo voluntary departure and instead to elect to challenge the final order through a motion to reopen or reconsider." *Id.*

> Or, put another way, these rules would allow the alien an opportunity to withdraw from the arrangement into which he or she effectively entered ... at the time of seeking and accepting voluntary departure[.]

Id. Although not binding in the present case, the proposed rule demonstrates that the Department agrees that withdrawal (that is effective immediately) is consistent with the statute.

2. Withdrawal from voluntary departure in order to pursue a motion to reopen is also consistent with the current regulatory framework. The Government correctly observed that there are no regulations prohibiting an alien from withdrawing a voluntary departure request so as to pursue a motion to reopen. *See* Oral Argument Tr. 32.

The agency, moreover, has permitted withdrawal under the current statutory and regulatory regime. *See Matter of Davis*, No. A76-832-166 (BIA Mar. 3, 2006) (unpublished) ("*Davis* 2006 Order").[7] *Davis* presents a strikingly similar factual scenario to the present case—except that Davis was *permitted* to withdraw the

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[7] Pursuant to Supreme Court Rule 32.3, counsel for Petitioner has sought permission to lodge the cited materials relating to *Davis* with the Clerk of the Court.

voluntary departure request, and obtain an adjudication of the motion to reopen, but Petitioner was not.

In *Davis*, as in the present case, the alien, who was married to a U.S. citizen, filed a motion to reopen, under *Matter of Velarde*, 23 I. & N. Dec. 253 (BIA 2002), and *Matter of Isber*, 20 I. & N. Dec. 676 (BIA 1993), and submitted evidence that the marriage was bona fide.[8] As in this case, Davis filed the motion to reopen with just a few days left in the voluntary departure period: Davis filed on Friday, December 2, 2005, and Davis's voluntary departure period was to expire just two days later (on Sunday, December 4).[9] When filing the motion—and using the identical language that Petitioner used in the present case—Davis sought to withdraw the voluntary departure request and, instead, be subject to a final order of removal.[10]

The BIA acted on Davis's motion approximately three months later, which, as in Petitioner's case, was after the voluntary departure period had expired. *Davis* 2006 Order. But unlike in the present case—and despite the parallel fact patterns and that the respec-

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[8] *Compare Matter of Davis*, Motion to Reopen/Reconsider and to Withdraw Request for Voluntary Departure and Request for Stay of Deportation 3-8 (BIA Dec. 1, 2005) ("*Davis* Mot.") *with* C.A. App. 11-14.

[9] *See Matter of Davis*, No. A76-832-166 (BIA Oct. 5, 2005) (unpublished); *Matter of Davis*, No. A76-832-166, Mot. Filing Receipt (Dec. 5, 2005).

[10] *Compare Davis* Mot. 7 ("[T]he respondent withdraws his request for voluntary departure and accepts an order of deportation.") *with* C.A. App. 13 (same).

tive motions were filed *on the same day*[11]—the Board permitted Davis to withdraw the request for voluntary departure. *Id.*[12] As a result, Davis was not subject to the penalties for overstaying the voluntary departure period, and the Board adjudicated the motion to reopen on the merits.[13]

3. The agency's regulations and precedent also permit termination of voluntary departure in other contexts, offering further support for withdrawal. For example, if an alien fails to post the required bond within five business days, then the voluntary departure order will "vacate automatically" and the alien will be subject to a final order of removal. 8 C.F.R. § 1240.26(c)(3).[14] As a result, an alien who has failed to post the required bond is not subject to penalties for overstaying and, therefore, may obtain an adjudication of his motion to reopen. *Matter of Diaz-Ruacho*, 24 I. & N. Dec. 47, 51 (BIA 2006).

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[11] Both motions to reopen are dated December 1, 2005 and were filed with the BIA on December 2, 2005. *Compare Davis* Mot. 12; *Davis* Mot. Filing Receipt *with* C.A. App. 3, 21.

[12] The Board stated that, in light of Davis's request to withdraw, it would not "reinstate voluntary departure" but would instead "enter an order of removal." *Davis* 2006 Order.

[13] The Board denied Davis's motion to reopen, undermining any argument that the withdrawal was based on the merits of the underlying motion. *See Davis* 2006 Order.

[14] Similarly, an alien's voluntary departure order will "vacate automatically" if the alien fails to provide the Government with his passport or other required travel documentation. 8 C.F.R. § 1240.26(b)(3)(ii); *see also id.* § 240.25(f) (voluntary departure "revo[cable] without advance notice" if the request "should not have been granted").

In *Diaz-Ruacho*, the alien was granted voluntary departure and later filed a motion to reopen. Notwithstanding the fact that the alien filed the motion to reopen almost one month *after* the end of the voluntary departure period, the Board granted the motion. The BIA held that because the alien had failed to post the required bond, he was not subject to penalties for overstaying the voluntary departure period. These penalties "did not attach" because the voluntary departure order had vacated once the alien failed to post bond. 24 I. & N. Dec. at 51. Thus, under the current regulations, the voluntary departure grant can automatically terminate in certain circumstances.[15]

* * *

The statutory provisions, the Department's proposed regulations, and the agency's current regulations and practice all support a construction of the statute that permits an alien granted voluntary departure to withdraw a request for voluntary departure in order to pursue a timely motion to reopen. Thus, if the Court declines to interpret the statute to permit tolling, it should construe the statute so as to permit Petitioner to withdraw his request for voluntary departure.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

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[15] The Department's proposed rule would alter this result prospectively, 72 Fed. Reg. at 67,684, but would nonetheless permit voluntary departure recipients to pursue motions to reopen, *id.* at 67,679.

Respectfully submitted.

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